IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1979 TERM

79-2066

Supreme Court, U. S.
FILED
JUN 28 1980
MICHAEL RODAK, JR., CLERK

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Plaintiffs, Appellants,

v Case No.

RICHARD H. AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN; OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and THE HONORABLE NORMAN R. BARNARD, LYNN D. ALLEN, and C. HUGH DOHANEY, as Members thereof; MICHIGAN STATE BOARD OF CANVASSERS and BERNARD J. APOL, NANCY CHASE, JESSIE M. DILLARD, WALTER OLIVER, and WALLACE D. RILEY, as Members thereof; THE OAKLAND COUNTY BOARD OF CANVASSERS and BARBARA A. BRINKER, SARAH C. DICKSON, SANDRA KOKOTOVICH, PATRICIA A. SANDERSON, and LYNN D. ALLEN, as Members thereof; and BERNARD J. APOL, as Director, BOARD OF ELECTIONS,

Defendants, Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

RAYMOND, RUPP & WIENBERG, P.C.

MARTIN STONEMAN (P 21063)
Attorney for Plaintiffs-Appellants
755 W. Big Beaver Road
Suite 1800
Troy, Michigan 48084
(313) 362-4440

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ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED ON APPEAL

I. DOES THE CONSTITUTION OF MICHIGAN (1963), ARTICLE VI, SECTION 19, WHICH PROHIBITS A JUDGE FROM RUNNING FOR RE-ELECTION TO JUDICIAL OFFICE UPON REACHING THE AGE OF SEVENTY (70) YEARS, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY CREATING AN IRREBUTTABLE PRESUMPTION OF UNFITNESS FOR OFFICE?

Appellants Respond: "YES"

II. DO THE MICHIGAN CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH PROHIBIT A JUDGE FROM RUNNING FOR RE-ELECTION TO JUDICIAL OFFICE UPON REACHING THE AGE OF SEVENTY (70) YEARS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Appellants Respond: "YES"

III. IS MANDAMUS THE APPROPRIATE PROCEEDING TO ADJUDICATE THE CONSTITUTIONALITY OF THE MICHIGAN CONSTITUTIONAL AND STATUTORY PROVISIONS PROHIBITING A JUDGE FROM RUNNING FOR RE-ELECTION TO JUDICIAL OFFICE UPON REACHING THE AGE OF SEVENTY (70) YEARS?

Appellants Respond: "YES"

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I. GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(a) NATURE OF THE PROCEEDING

This is an appeal from the decision of the Michigan State Court of Appeals, entered May 9, 1980, dismissing the Plaintiffs-Appellants' Complaint for Mandamus, and from a decision of the Michigan State Supreme Court, entered June 19, 1980, denying leave to appeal. Said decisions have not been reported, but are attached hereto for this Honorable Court's consideration and review.

This action is a proceeding for mandamus within the original jurisdiction of the Michigan State Court of Appeals pursuant to MSA 27A.4401, MCLA 600.4401, and Michigan General Court Rule, 1963 714.1. The Plaintiffs-Appellants filed a Complaint for Mandamus in the Michigan Court of Appeals challenging the constitutionality of certain mandatory retirement provisions for judges, hereinafter set forth, and seeking a Writ of Mandamus to compel the elections officials of the State of Michigan to place the name of the Plaintiff-Appellant, the Honorable William John Beer, on the ballot for the August, 1980 primary election and the November, 1980 general election for the office of Circuit Judge for the County of Oakland, Michigan.

On May 9, 1980, the Michigan Court of Appeals entered an Order dismissing the Plaintiffs-Appellants' Complaint for Mandamus, thereby ruling in favor of the constitutionality of the challenged mandatory retirement provisions which are hereinafter set forth. On June 19, 1980, the Michigan Supreme Court denied the Plaintiffs-Appellants' leave to Appeal from the decision of the Michigan Court of Appeals. Therefore, the Plaintiffs-Appellants have exhausted all State remedies and are appealing from a decision of the highest state court available to render a decision.

(b) STATUTORY PROVISION UPON WHICH JURISDICTION IS INVOKED.

Jurisdiction is properly conferred upon this Honorable Court pursuant to 28 USC 1257(2):

> "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(c) CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE.

A. The Constitution of Michigan (1963), Article VI, Section 19, which provides in pertinent part:

> "No person shall be elected or appointed to a judicial office after reaching the age of seventy (70) years."

B. MSA 6.1411, MCLA 168.411, which provides in pertinent part:

> "No person shall be eligible to the office of judge of the Circuit Court who is not a qualified elector of the judicial circuit in which election is sought, as provided in Section 11 of Article VI of the State Constitution, who is not licensed to practice law in the State and who at the time of election is seventy (70) years of age or older."

C. MSA 6.1413(1), MCLA 168.413(a) which provides:

> "Any incumbent Circuit Court Judge may become a candidate in the primary election for the office of which he is an incumbent by filing with the Secretary of State, an Affidavit of Candidacy not less than 120 days prior to the date of the primary election. The Affidavit of Candidacy shall contain statements that the Affiant is an incumbent Circuit Court Judge for the Circuit in which election is sought, that he is domiciled within the Circuit, that he will not attain the age of seventy (70) by the date of election, and a declaration that he is a candidate for election to the office of Circuit Court Judge."

(d) FACTS OF THE CASE.

A. Plaintiff-Appellant, the Honorable William John Beer, is a Judge of the Circuit Court for the County of Oakland, State of Michigan, having been first elected to said office on April 6, 1959. He was last re-elected to said office on November 5, 1974, and holds his office pursuant to a Certificate of Election issued by the Secretary of the State of Michigan on November 27, 1974.

Judge Beer was born on February 17, 1909. Judge Beer desires to run for re-election to said office in the August 5, 1980 primary election and in the November, 1980 general election.

B. Plaintiffs-Appellants, Thomas Plunkett, Barry Yaker, Frances R. Avadenka, and Warren Newton, are residents of Oakland County, Michigan, are registered voters therein and desire to vote for the Honorable William John Beer for the office of Circuit Judge for the County of Oakland in the August, 1980 primary election and in the November, 1980 general election.

C. On or about March 17, 1980, the Honorable William John Beer tendered his Affidavit of Candidacy for judicial office to Defendant, Bernard J. Apol, Michigan State Director of Elections, together with all other requisite documents as required by the Constitution and statutes of the State of Michigan. Mr. Apol is vested with the powers and performs the duties of the Michigan Secretary of State with regard to the supervision and administration of the election laws, while under the Secretary's direction.

D. On March 20, 1980, George H. Herstek, Jr., Deputy Director, Elections Division, acting on behalf of Mr. Apol, and under color of the aforementioned Michigan Constitutional and statutory provisions, rejected Judge

Beer's Affidavit of Candidacy for re-election to judicial office solely by reason of Judge Beer's age.

E. On April 4, 1980, Judge Beer filed a Complaint for Mandamus in the Michigan Court of Appeals to compel the State elections officials to place his name on the ballot, alleging that the aforementioned Constitutional and statutory mandatory retirement provisions of the State of Michigan, pursuant to which Mr. Herstek rejected Judge Beer's Affidavit of Candidacy, are unconstitutional under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that said provisions create an irrebuttable presumption of Judge Beer's incompetency to hold judicial office and deny him the right to continue to hold judicial office, without any form of hearing or determination as to his fitness for said office, contrary to principles of due process. Thomas Plunkett, Barry Yaker, Frances R. Avadenka, and Warren Newton, joined as Plaintiffs in the within action alleging that the aforementioned constitutional and statutory mandatory retirement provisions for judges deprive them of their rights under the First and Fourteenth Amendments to the Constitution of the United States to vote for the candidate of their choice, the Honorable William John Beer, for the office of circuit judge for the County of Oakland, Michigan, in the August, 1980 primary election and the

November, 1980 general election.

F. On April 30, 1980, the Michigan Court of Appeals, without oral argument, summarily dismissed the Plaintiffs-Appellants' Complaint for Mandamus for "lack of merit on the grounds presented". On June 19, 1980, the Michigan State Supreme Court denied the Plaintiffs-Appellants' Application for Leave to Appeal.

G. Judge Beer is a fully qualified and able judge of the Circuit Court for the County of Oakland, Michigan, and, but for his age, would be entitled to run for re-election to said office in the upcoming primary and general elections.

H. No other elected official in the State of Michigan is deprived of office by virtue of his or her age.

I. Notwithstanding the State of Michigan's apparent presumption embodied in its constitutional and statutory mandatory retirement provisions that judges are unfit for election to office upon reaching the age of seventy (70) years, the State relies upon judges aged seventy (70) and older to fill vacancies in judicial office. In the years 1977-1979, inclusive, five hundred twenty six (526) assignments were given to judges seventy (70) years of age or older. Pursuant to these assignments, judges seventy (70) years of age or older served a total of 2,506 days. Nearly fifty (50%) percent of the total number of assignments issued by the Michigan Supreme Court during this three (3) year period

were handled by judges seventy (70) years of age or older. (See attached letter of Einar Bohlin, Michigan State Court Administrator, Michigan State Court Administrative Office, dated March 11, 1980).

J. The Michigan constitutional and statutory mandatory retirement provisions do not require a judge who reaches the age of seventy (70) years while in office to retire; they only prohibit a judge from running for re-election if he has or will attain the age of seventy (70) years prior to the election. Michigan law provides for staggered terms for circuit judges of from six (6) to ten (10) years. Therefore, a judge whose seventieth birthday falls after the general election may continue to hold office for the remainder of his term, which could be as much as ten (10) years, or until he is nearly eighty (80) years old.

K. The people of the State of Michigan have created a Michigan State Judicial Tenure Commission, pursuant to the Michigan Constitution (1963), Article VI, Section 30, whose duty it is to examine and rule upon the fitness of any judge for judicial office within the State.

L. On the basis of the foregoing facts, taken in conjunction with prior decisions of this Honorable Court, and those of lower federal courts and state courts which

have ruled upon the constitutional issues raised herein, there is a meritorious basis for plenary consideration of this case by this Honorable Court.

(e) REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

A. The subject matter of this appeal involves legal principles of major constitutional significance because this Honorable Court shall be asked to decide whether, consistent with the standards of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, a presumptively competent and qualified judge of a Circuit Court for the State of Michigan may be summarily deprived of an opportunity to run for re-election to judicial office without a hearing for determination as to his fitness for office, solely because he has attained the age of seventy (70) years. As observed by Stephen Hess of the Brookings Institution, this is wrong. (Exhibit "A").

B. The rulings of the Michigan Court of Appeals and State Supreme Court have upheld the validity of constitutional and statutory mandatory retirement provisions in the face of a challenge that these provisions violate rights guaranteed the Plaintiffs-Appellants by the Constitution of the United States.

C. The rulings of the Michigan Court of Appeals and Supreme Court have upheld the validity of constitutional and statutory provisions which operate to deny the "voter

Plaintiffs" their constitutionally guaranteed right to vote for the candidate of their choice for the office of Circuit Judge for the County of Oakland, Michigan.

(f) NOTICE OF APPEAL DULY FILED

On July 2, 1980, Notice of the within Appeal was duly filed with the Michigan Supreme Court and the Michigan Court of Appeals.

WHEREFORE, the Plaintiffs-Appellants, the Honorable William John Beer, Thomas Plunkett, Barry Yaker, Frances R. Avadenka and Warren Newton, respectfully pray that this Honorable Court note probable jurisdiction over this appeal, permit the filing of Briefs, and set this appeal for oral argument.

Respectfully submitted,

Dated:_____

RAYMOND, RUPP & WIENBERG, P.C.

MARTIN STONEMAN (P 21063)
Attorneys for Plaintiffs-Appellants
755 W. Big Beaver Road
Suite 1800
Troy, Michigan 48084
(313) 362-4440

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the thirtieth day of April in the year of our Lord one thousand nine hundred and eighty

Present the Honorable

Daniel F. Walsh

Presiding Judge

Robert B. Burns
Donald E. Holbrook, Jr.
Judges

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Plaintiffs,

v

No. 50818

SECRETARY OF STATE OF THE STATE OF MICHIGAN, OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and MEMBERS THEREOF, MICHIGAN STATE BOARD OF CANVASSERS, ITS SECRETARY and MEMBERS THEREOF, OAKLAND COUNTY BOARD OF CANVASSERS and MEMBERS THEREOF, and DIRECTOR, BOARD OF ELECTIONS,

Defendants.

In this cause a complaint for mandamus and motion for order to show cause are filed by plaintiffs, and an answer in opposition thereto together with a motion for extension of time in which to file brief and a motion for immediate consideration of the motion for extension of time having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for order to show cause be, and the same is hereby DENIED for lack of merit in the grounds presented.

IT IS FURTHER ORDERED that the complaint for mandamus be, and the same is hereby DISMISSED.

IT IS FURTHER ORDERED that the motion for extension of time in which to file brief and motion for immediate consideration of the motion for extension of time be, and the same are hereby DENIED as moot.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 9th day of May in the year of our Lord one thousand nine hundred and eighty

Clerk

CAJC180

AT A SESSION OF THE SU. .ME COURT OF THE STATE OF M IIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of June in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 30-159 & a

THE HONORABLE WILLIAM JOHN BEER, THOMAS PLUNKETT, BARRY YAKER, FRANCES R. AVADENKA, and WARREN NEWTON,

Plaintiffs-Appellants,

v

SC: 65259
COA: 50818

SECRETARY OF STATE OF THE STATE OF MICHIGAN, OAKLAND COUNTY BOARD OF ELECTION COMMISSIONERS and MEMBERS THEREOF, MICHIGAN STATE BOARD OF CANVASSERS, ITS SECRETARY and MEMBERS THEREOF, OAKLAND COUNTY BOARD OF CANVASSERS and MEMBERS THEREOF, and DIRECTOR, BOARD OF ELECTIONS,

Defendants-Appellees.

On order of the Court, the plaintiffs-appellants' motion for immediate consideration is considered, and it is GRANTED.

The application for leave to appeal is also considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

Kavanagh and Moody, JJ., would grant leave to appeal.

Williams, J., not participating.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 19th day of June in the year of our Lord one thousand nine hundred and eighty.

Jacqueline B. Thorne Clerk.
Deputy

State Court Administrative Office

NORTH WASHINGTON SQUARE, P. O. BOX 30048
LANSING, MICHIGAN 48909
517/373-0130

COURT ADMINISTRATOR
EINAR BOHLIN

March 11, 1980

Hon. William J. Beer
6th Circuit Court
1200 N. Telegraph Road
Pontiac, MI 48053

Dear Judge Beer:

At your request a review of the records of the State Court Administrative Office has been made and the following information gathered in an attempt to answer your questions.

1. Pursuant to what authority does the Supreme Court appoint Retired Judges to sit as visiting judges? In what year was this authority promulgated or instituted?

MCLA 600.226; MSA 27A.226, effective since 1964 provides that the Supreme Court may authorize any retired judge from any court of record to perform judicial duties in any court of record in the state where there is a judicial vacancy. Section 23 of Article 6 of the Michigan Constitution allows the Supreme Court to authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

2. How many judges retired in the State of Michigan in each of the last five years? How many of these judges were over the age of 70?

Year	No. Judges Retired
1975	17
1976	18
1977	10
1978	16
1979	14

A total of 75 judges retired in the past 5 years. Twenty of those judges were 70 or older.

3. How many retired judges have received assignments as visiting judges in each of the last five years? How many of these judges were over the age of 70?

Year	No. Inactive Judges Assigned	No. Judges Over 70
1975	19	7
1976	31	13
1977	60	22
1978	63	25
1979	77	26

(Inactive means retired, resigned or defeated.)

4. How many Retired Judges have requested but not received appointments as visiting judges? Upon what basis is such a refusal made?

Approximately 100 judges answered our questionnaire indicating they would be willing to accept assignments. Approximately 23 judges have not received assignments (1978-79 figures). These 23 judges did not receive assignments because appropriate assignments were not available for them. It should be noted that in making assignments, an attempt is made to assign cases to active judges before assigning them to inactive judges.

5. By what authority are these visiting judges compensated? What is the method or manner of compensation made? (i.e., per diem, per week, etc.) What is the rate of compensation. If the method is per diem, is compensation made for days actually on the bench or does it include days spent in preparation or writing opinions?

MCLA 600.226; MSA 27A.226 provides that an assigned judge shall receive the same salary and from the same source as provided for the vacant judicial office. The salary for each day that the judge serves shall be 1/250 of the salary of the vacant judge. The state shall pay necessary expenses incidental to performing the duties required by the assignment.

6. What is the source of funds used for compensating visiting judges? Is this fund unlimited or is it a specific appropriation? If the fund is specific, do funds ever run out, requiring visiting judges to work for free?

Funds for the payment of assigned judges are provided for by the legislature in the general appropriations bills. The judges would never be in a position of having to work for free.

7. What is the average length of an assignment for a visiting judge? What is the average number of assignments given to one judge in any given year?

Year	Average Length	Total Days Served*	Total No. Assignments
1975	3.5 days	578	164
1976	2.1 days	246	116
1977	3.5 days	795	226
1978	3.6 days	1,318	368
1979	2.8 days	1,387	496

(Average length of assignment determined by dividing total days served by the total number of assignments.)

Year	Average No. Assignments Per Inactive Judge	Total No. Assignments	Total No. Inactive Judges
1975	8.6	164	19
1976	3.9	116	31
1977	3.8	226	60
1978	5.8	368	63
1979	6.4	496	77

(Average assignments determined by dividing the total number of assignments by the total number of inactive judges.)

*Many assignments were not reported as to number of days served.

Addendum

1980 - Number of judges available for assignment 231
Number of judges requesting assignment 100
Number of judges 70 or over, available and willing to accept assignment 91

Number of judges 70 or older that received assignments:
1975 - 7
1976 - 13
1977 - 22
1978 - 25
1979 - 26

Number of Assignments to Judges 70 or older
1975 - 91
1976 - 64
1977 - 141 \
1978 - 159 / 526
1979 - 226

Number of days served by judges 70 or older (some judges have not reported number of days).

1975 - 348
1976 - 178
1977 - 516.5
1978 - 874 > 2506
1979 - 915.5

Year	Average # Assignments to Judges 70 or over	No. Assignments to Judges 70 or over	No. of Judges 70 or over
1975	13	91	7
1976	4.9	64	13
1977	6.4	141	22
1978	6.4	159	25
1979	8.7	226	26

Year	Average # days Served by Judges 70 or older	No. days served by Judges 70 or older	No. Assignments to Judges 70 or older
1975	3.8	348	91
1976	2.8	178	64
1977	3.7	516.5	141
1978	5.5	874	159
1979	4.0	915.5	226

(Average days served determined by dividing number of days served by judges 70 years old or older by the number of assignments to judges 70 years old or older.)

8. Has the State Court Administrator's Office done any studies on the productivity of Retired/Visiting Judges? If so, could you summarize the results?

No such study has been attempted by this office.

9. Would a retired judge's engaging in private practice preclude his receiving an appointment as a visiting judge?

Canon 5 of the Code of Judicial Conduct provides that a judge should not practice law for compensation except as otherwise provided by law. However, there appears to be no authority to prevent an attorney engaging in private practice from receiving an appointment so long as no conflict of interest is involved. The Supreme Court has a policy that no assigned judges practice law for the duration of any assignment.

I trust that the information provided satisfactorily answers your questions. If I can be of any further assistance, please feel free to contact me.

Sincerely,

Ejnar Bohlin

EB:j

'Not Qualified By Reason of Age'?

By STEPHEN HESS

The Bible rates the ancient Solomon as wondrous wise, but in the wisdom of the American Bar Association (ABA) he would not have been qualified to be appointed a U.S. judge.

THE ABA is the semiofficial rater of candidates for the federal bench. The attorney general gives the names of potential judges to the ABA and it then tells the government whether or not a candidate is qualified. The ABA has decreed that no person over the age of 64 should get an initial judicial appointment. The formal category it has devised is "not qualified by reason of age."

There is nothing about age in the "Standards and Guidelines for the Merit Selection of United States District Judges" (Executive Order 12097, Nov. 8, 1978). The President simply and correctly states that proposed nominees should be "of sound physical and mental health." Age discrimination apparently is something that the ABA thought up all by itself.

That the ABA has been given *de facto* veto power over the composition of the nation's judiciary raises serious questions about the extent to which elected officials should be allowed to abdicate their constitutional responsibilities.

ARE THERE NOT more interests involved than "peer review"? That the ABA considers age a criterion for successful service suggests that it does not even know what profession it represents. Technically, the effect of aging on job performance should be determined by medical researchers, not lawyers.

EXHIBIT "A"

There has been considerable speculation on this subject in the press. It relates, of course, to whether a 69-year-old male is fit to assume the duties of president. A most interesting article appears in The New Republic, written by Walter Shapiro of The Washington Post, who actually interviewed leading scientific experts, notably at the National Gerontology Center in Baltimore.

Mr. Shapiro concludes that "with few exceptions, they would all vote for a candidate of Mr. Reagan's age, if they respected his background, agreed with his politics, and were convinced that he was in good health." Mr. Reagan's age, in other words, is not a legitimate issue to most of those best able to judge."

IF THEY FEEL this way about the presidency, it should be obvious how the ability of a healthy person to serve as a judge would be judged by the scientists.

What about the historians? Surely they would note the ages of our most distinguished jurists. They might even find some correlations between age and wisdom.

Chief Justice John Marshall served on the Supreme Court for 15 years after his 65th birthday. Oliver Wendell Holmes was there for 26 additional years. Must the ABA ignore the lessons of history as well as science?

There is a certain irony in that the first person to have been denied a judgeship because of the ABA's age guideline is one of the most revered legal minds in the country.

Archibald Cox, Harvard Law School professor and former Watergate special prosecutor, was 67 years old when in 1979 he was the unanimous first choice of a panel that recommended candidates for a new seat on the First Circuit Court of Appeals (Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico). Citing the ABA rule, then Attorney General Griffin B. Bell announced that Mr. Cox was too old.

MR. BELL, it will be recalled, had earlier resigned a federal judgeship, presumably because he could make more money in private practice. Perhaps older (still healthy) lawyers would find that serving on the federal bench is less of a hardship.

At the same time, there are several encouraging changes in the characteristics of the federal judiciary. According to Judith H. Parris of the Congressional Research Service, Library of Congress, the percentage of women nominated to the U.S. District Court has gone from 0.6 under Richard Nixon to 12.5 under President Carter, blacks from 2.8 to 11.8, and Hispanics from 0.0 to 6.3.

As for age discrimination, President Carter should tell the ABA that his Executive Order means exactly what it says. If, on the other hand, Mr. Reagan is elected, the issue becomes moot.

A 70-year-old President is hardly likely to believe that a 65-year-old judge is "not qualified by reason of age."

Stephen Hess is a senior fellow at the Brookings Institution.